LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S
FILED
NOV 12 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 503

UNITED STATES OF AMERICA,
Appellant,

v.

PENN-OLIN CHEMICAL COMPANY, ET AL.

On Appeal From the United States District Court For the District of Delaware

APPELLEES' MOTION TO AFFIRM

Of Counsel:

BERL, POTTER & ANDERSON

CRAVATH, SWAINE & MOORE
and JOHN W. BARNUM

DECHERT, PRICE & RHOADS
and JOHN T. SUBAK

WILLIAM S. POTTER
Delaware Trust Building
Wilmington, Del. 19801
Attorney for Appellees

ALBERT R. CONNELLY
1 Chase Manhattan Plaza
New York, N. Y. 10005
Attorney for Appellee
Olin Mathieson Chemical Corporation

H. FRANCIS DELONE
1600 Three Penn Center Plaza
Philadelphia, Pa. 19102
Attorney for Appellee
Pennsalt Chemicals Corporation

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

UNITED STATES OF AMERICA, *Appellant*, v. PENN-OLIN CHEMICAL COMPANY, et al.	No. 503

On Appeal From the United States District Court For the District of Delaware

APPELLEES' MOTION TO AFFIRM

Appellees move, pursuant to paragraph 1(c) of Rule 16 of the Revised Rules of this Court, that the judgment of the district court be affirmed.* That court's decision that appellant failed "to establish that the joint venture probably will have the effect of substantially lessening competition" (44a) and that, on the contrary, the probabilities are that Penn-Olin will have the effect of stimulating competition (43a) is a factual determination which presents no substantial question requiring further argument.

Question Presented

Does the formation of a jointly-owned subsidiary to produce and sell sodium chlorate in the Southeastern United States adversely affect competition in violation of either Section 7 of the Clayton Act or Section 1 of the Sherman Act where the evidence showed and the trial court found that the formation of the joint subsidiary would not lessen competition in the relevant market, and in fact has increased competition.

*On October 24, 1963, Mr. Justice Brennan signed an order extending the time of appellees to file such a motion to and including November 12, 1963.

Statement

In February 1960 Pennsalt Chemicals Corporation (Pennsalt) and Olin Mathieson Chemical Corporation (Olin) formed a jointly-owned subsidiary, Penn-Olin Chemical Company (Penn-Olin), to produce and sell sodium chlorate in the Southeastern United States. Prior to that time Olin had never commercially produced sodium chlorate (12a)* and Pennsalt had only produced it in the Pacific Northwest (11a). Thus Penn-Olin brought a new competitor into the Southeast sodium chlorate market, which is the relevant market for determining the competitive impact of the joint venture (11-12, 14a-24a).

Prior to Penn-Olin, as appellant admits, Hooker Chemical Corporation (Hooker) and American Potash & Chemical Corporation (American Potash) were the only producers of sodium chlorate in that market; "[n]o new firms had entered the industry in a decade (App. 33a); prices were stable (PX 254, ¶ 1); and little effort had been made to expand existing uses or to develop new ones (PX 146, p. 2)." (8) As the trial court put it, Hooker and American Potash "had a virtual monopoly in the southeast" (34a, 42a-43a)—over 91 per cent of the sodium chlorate business (28a)—and Penn-Olin was formed to break into this market to challenge the supremacy of these two dominant companies (27a-28a).

Since the formation of Penn-Olin, competition in the Southeastern sodium chlorate market has in fact become more vigorous. Both Hooker and American Potash have increased their sodium chlorate capacity and have intensified their competitive efforts (30a-31a). Another new producer, Pittsburgh Plate Glass Company, has entered the market (32a). Appellant's own witness testified that since Penn-Olin there had been no lessening in competition and that

*All page references are to appellant's jurisdictional statement and the district court's opinion printed as a supplement thereto.

he anticipated no such lessening in the future (42a). The evidence showing that competition has become more vigorous since Penn-Olin is not challenged here by appellant, and is exemplified by the following comparison of the sodium chlorate producers in the Southeast market before and after Penn-Olin (43a):

	Sodium Chlorate Capacity in Tons	
Company	1959	Projected-1962
Hooker	29,150	32,000
American Potash	12,000	22,500
Penn-Olin	—	26,500
Pittsburgh Plate Glass	—	15,000*
Total	41,150	96,000

Argument

Appellant concedes that the district court correctly applied the "lessening of competition" test of Section 7, which requires a comparison between the competitive situation brought about by the formation of Penn-Olin and the competitive situation which, with reasonable probability, would have existed but for Penn-Olin (16, 40a-41a).

But appellant asserts that both Pennsalt and Olin were, first, physically "capable" of entering the Southeast sodium chlorate market, and, second, interested in doing so (17-18). Based solely on this claim of physical "capability" plus "interest" (18), appellant claims this Court must infer, as a matter of law, that both Pennsalt and Olin *would* probably have built sodium chlorate plants in the Southeast and that the joint venture would necessarily lessen competition. Neither inference is warranted.

At trial appellant tried unsuccessfully to establish that, but for Penn-Olin, both Pennsalt and Olin would have

*To be achieved gradually on a stepped-up basis.

built sodium chlorate plants in the Southeast. But the evidence only showed what appellant now correctly labels as "capability plus interest" (18). For about twenty years Pennsalt had produced sodium chlorate at Tacoma, Washington, but it had no marketing or sales coverage for the sodium chlorate market in the Southeast (34a-35a, 19a-20a). For a number of years Pennsalt had made marketing and cost studies of a sodium chlorate plant in the Southeast, but, as the trial judge concluded, it never decided to build a sodium chlorate plant there "due primarily to the inability of the management to satisfy itself that the plant would be sufficiently profitable to meet the rate of return standard which it had established as a condition for new investments" (35a).

Olin, which had never produced sodium chlorate on a commercial basis, also had investigated the Southeastern market. But Olin, too, had never decided to build a sodium chlorate plant because, as the trial court found, of the unsatisfactory projected rate of return (35a-36a).

As the trial court pointed out, the most favorable inference from appellants' point of view that might be drawn from this evidence is that, but for Penn-Olin, either Pennsalt or Olin—but not both—would have entered the market (39a). But even under this assumption, appellant could not show that the entry of either Pennsalt or Olin would have provided more competition than was provided by Penn-Olin (39a-42a).

Appellant assumes that two possible competitors are better, as a matter of law, than one actual competitor. Appellant totally ignores the concrete and evidence-supported actual increase in competition which has resulted from Penn-Olin, and makes no effort to show what competition might have resulted but for Penn-Olin (*cf.* 18-19). Appellant thus ignores this Court's opinion of Section 7 that:

> "Taken as a whole, the legislative history illuminates congressional concern with the protection of *com-*

> *petition*, not *competitors*, and its desire to restrain mergers only to the extent that such combinations may tend to lessen competition." *Brown Shoe Co.* v. *United States*, 370 U. S. 294, 320 (1962).

Comparing the competitive situation which resulted from Penn-Olin with the competitive situation that was likely to obtain but for Penn-Olin, the district court found that the entry of Penn-Olin in the Southeastern sodium chlorate market "will in all likelihood increase the competition which theretofore existed and bring to buyers of sodium chlorate and to the public the benefits which normally result therefrom." (43a) It based this conclusion on the prior virtual monopoly of the Southeastern market by Hooker and American Potash (42a-43a), the testimony of appellant's own witness that there had been no lessening in the vigor of competition since Penn-Olin (42a), the entry of a fourth competitor, Pittsburgh Plate Glass, into a previously two-company market (43a), and the lack of any evidence of an anti-competitive effect from Penn-Olin (41a-42a). Applying what appellant concedes to be the proper legal standard,* the trial court found that the formation of Penn-Olin would probably stimulate competition (43a) and that it did not violate Section 7 of the Clayton Act.

This is not, as appellant claims (14-15), a test case for joint ventures. Rather, the decision of this case depends on a factual determination by the district court that Penn-Olin tended to increase, not lessen, competition.

Appellant has also referred to two secondary questions: whether the statutory requirement of Section 7 that the acquired corporation be "engaged . . . in commerce" was met (21-23) and whether the formation of Penn-Olin

---

*"The district court properly recognized (App. 40a-41a) that the 'lessening of competition' standard requires a comparison between the competitive situation brought about by the challenged transaction and the situation which, with reasonable probability, would have existed had the transaction not occurred." (16)

violated Section 1 of the Sherman Act (23-24). As the trial court recognized (6a-7a), neither question need be reached if it is found that the joint venture did not adversely affect competition in violation of Section 7.

Conclusion

There is no significant question presented by this appeal. Appellant simply failed to prove its case. There being no substantial question which requires further consideration, appellees move this Court to affirm the district court's judgment.

November 12, 1963

Respectfully submitted,

WILLIAM S. POTTER
Delaware Trust Building
Wilmington, Del. 19801
Attorney for Appellees

ALBERT R. CONNELLY
1 Chase Manhattan Plaza
New York, N. Y. 10005
Attorney for Appellee
Olin Mathieson Chemical Corporation

H. FRANCIS DELONE
1600 Three Penn Center Plaza
Philadelphia, Pa. 19102
Attorney for Appellee
Pennsalt Chemicals Corporation

Of Counsel:

BERL, POTTER & ANDERSON

CRAVATH, SWAINE & MOORE and
JOHN W. BARNUM

DECHERT, PRICE & RHOADS and
JOHN T. SUBAK